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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 DEVELL MOORE,

9 Petitioner,

10 v.

11 LEGRAND, *et al.*,

12 Respondents.

Case No.: 3:13-cv-00390-LRH-WGC

13  
14 **ORDER**

15 This habeas petition is before the court for a decision on the merits (ECF No. 32).

16 Respondents filed an answer (ECF No. 40), and petitioner Devell Moore filed a reply  
(ECF No. 45).

17 **I. Procedural History and Background**

18 In 2009, a jury found Moore guilty of 3 counts of sexual assault of a minor under  
19 age 14 and 1 count of lewdness with a child under age 14 (exhibit 13).<sup>1</sup> The state  
20 district court sentenced him to 3 consecutive terms of life with the possibility of parole  
21 after 35 years with a concurrent term of life with the possibility of parole after 10 years.

22 Exh. 14. Judgment of conviction was entered on February 3, 2010. Exh. 15.

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1 Exhibits referenced in this order are found at ECF Nos. 19-21, 36.

1 The Nevada Supreme Court affirmed Moore's convictions, affirmed the denial of

2 Moore's state postconviction petition, and denied a motion for rehearing of the petition.

3 Exhs. 21, 27, 29.

4 On July 19, 2013, Moore dispatched his federal habeas petition for filing (ECF

5 No. 6). Ultimately, this court appointed the Federal Public Defender as counsel for

6 Moore. Respondents have now answered the petition (ECF No. 40).

7 **II.     LEGAL STANDARD -Antiterrorism and Effective Death Penalty Act  
(AEDPA)**

9 28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty

10 Act (AEDPA), provides the legal standards for this court's consideration of the petition in

11 this case:

12 An application for a writ of habeas corpus on behalf of a person in  
13 custody pursuant to the judgment of a State court shall not be granted with  
14 respect to any claim that was adjudicated on the merits in State court  
proceedings unless the adjudication of the claim —

15       (1)     resulted in a decision that was contrary to, or involved an  
16       unreasonable application of, clearly established Federal law, as  
17       determined by the Supreme Court of the United States; or

18       (2)     resulted in a decision that was based on an unreasonable  
19       determination of the facts in light of the evidence presented in the State  
20       court proceeding.

21 The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
22 applications in order to prevent federal habeas 'retrials' and to ensure that state-court  
23 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S.  
685, 693-694 (2002). This Court's ability to grant a writ is limited to cases where "there  
is no possibility fair-minded jurists could disagree that the state court's decision conflicts

1 with [Supreme Court] precedents.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The  
2 Supreme Court has emphasized “that even a strong case for relief does not mean the  
3 state court’s contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538  
4 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing  
5 the AEDPA standard as “a difficult to meet and highly deferential standard for evaluating  
6 state-court rulings, which demands that state-court decisions be given the benefit of the  
7 doubt”) (internal quotation marks and citations omitted).

8 A state court decision is contrary to clearly established Supreme Court  
9 precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that  
10 contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state  
11 court confronts a set of facts that are materially indistinguishable from a decision of [the  
12 Supreme Court] and nevertheless arrives at a result different from [the Supreme  
13 Court’s] precedent.” *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362,  
14 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

15 A state court decision is an unreasonable application of clearly established  
16 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court  
17 identifies the correct governing legal principle from [the Supreme Court’s] decisions but  
18 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538  
19 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause  
20 requires the state court decision to be more than incorrect or erroneous; the state  
21 court’s application of clearly established law must be objectively unreasonable. *Id.*  
22 (quoting *Williams*, 529 U.S. at 409).

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1 To the extent that the state court's factual findings are challenged, the  
2 "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas  
3 review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause  
4 requires that the federal courts "must be particularly deferential" to state court factual  
5 determinations. *Id.* The governing standard is not satisfied by a showing merely that the  
6 state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires  
7 substantially more deference:

8 .... [I]n concluding that a state-court finding is unsupported by  
9 substantial evidence in the state-court record, it is not enough that we  
10 would reverse in similar circumstances if this were an appeal from a  
district court decision. Rather, we must be convinced that an appellate  
panel, applying the normal standards of appellate review, could not  
reasonably conclude that the finding is supported by the record.

11  
12 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.2004); see also *Lambert*, 393  
13 F.3d at 972.

14 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be  
15 correct unless rebutted by clear and convincing evidence. The petitioner bears the  
16 burden of proving by a preponderance of the evidence that he is entitled to habeas  
17 relief. *Cullen*, 563 U.S. at 181.

18 **III. Instant Petition**

19 **Ground 1**

20 Moore asserts that his Fifth and Fourteenth Amendment rights were violated by  
21 the trial court's failure to grant his request to exclude his taped confessional statement  
22 where he failed to explicitly waive his Miranda rights and where the circumstances of  
23 the in-custody interview rendered his statement involuntary (ECF No. 32, pp. 12-14).

1       The Fifth Amendment to the United States Constitution guarantees the privilege  
2 against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme  
3 Court established procedural safeguards to protect the exercise of the privilege against  
4 self-incrimination. Prior to questioning, law enforcement must inform the suspect of his  
5 or her right to remain silent and the right to have counsel present during interrogation.  
6 A suspect has the right to cut off questioning at any time. *Id.*

7       After Moore was arrested, he was taken to an interview room at the police  
8 station. The detective who questioned Moore first read Moore his Miranda rights, and  
9 Moore stated that he understood his rights. Exh. 3. Moore then confessed to the  
10 crimes charged. The transcript reflects that Moore answered the detective's questions  
11 and never invoked his right to remain silent or to have counsel present. Moore did  
12 indicate that he needs "mental help" because he makes bad judgments, but his  
13 statements are coherent, often detailed, and responsive to the questions. The detective  
14 relayed the accusations and Moore responded: "I foolishly have made the wrong  
15 judgment and do the wrong thing, and I really just—I've, I've even told uh, my fiancé  
16 that I need mental help on a lot of situations because I get very hostile . . . um, just bad  
17 judgment . . . my mental is truly off." Moore also responded to questions with specifics  
18 about the types of abuse, and where and when the abuse took place. *Id.* At trial, the  
19 State played the tape of Moore's statement to police. Exh. 10, p. 31.

20       Affirming the convictions, the Nevada Supreme Court denied the claim:

21       Moore contends that the district court erred by denying his motion to  
22 suppress his confession because it was involuntary and obtained in  
23 violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree. After  
the interviewing detective recited Moore's Miranda rights, Moore stated  
that he understood them and never unambiguously invoked his right to  
remain silent. See *Berghuis v. Thompkins*, 560 U.S. \_\_, \_\_, 130 S. Ct.

1 2250, 2259-60 (2010). Further, a review of the factors he cites in support  
2 of his brief argument that his confession was involuntary do not lead us to  
conclude that substantial evidence does not support the district court's  
conclusion. See *Rosky v. State*, 111 P.3d 690, 694 (2005).

3 Exh. 21 at 1.

4 Moore has not demonstrated that the in-custody interview violated his Miranda  
5 rights. The Nevada Supreme Court's adjudication of this claim did not result in a  
6 decision that was contrary to, or involved an unreasonable application of, clearly  
7 established federal law, as determined by the Supreme Court of the United States; nor  
8 was its decision based on an unreasonable determination of the facts in light of the  
9 evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d). Federal  
10 habeas relief is denied as to ground 1.

11 **Ground 2**

12 Moore argues that the trial court violated his Fourteenth Amendment equal  
13 protection and fair trial rights when it allowed the prosecution to use its peremptory  
14 challenges to exclude 2 prospective jurors (ECF No. 32, pp. 14-17).

15 In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court  
16 held that the Equal Protection Clause guarantees defendants that prosecuting  
17 authorities will not exclude members of a protected minority class from the jury venire  
18 pool solely based on race. The Court subsequently pronounced a three-part test for  
19 determining whether a prospective juror has been impermissibly excluded:

20 Under our *Batson* jurisprudence, once the opponent of a peremptory  
challenge has made out a prima facie case of racial discrimination (step  
21 1), the burden of production shifts to the proponent of the strike to come  
forward with a race-neutral explanation (step 2). If a race-neutral  
22 explanation is tendered, the trial court must then decide (step 3) whether  
the opponent of the strike has proved purposeful discrimination.  
23

*Purkett v. Elem*, 514 U.S. 765, 767 (1995).

1       The state-court record reflects that during jury selection defense counsel moved  
2 for a mistrial, arguing that the State had violated *Batson*. Counsel argued that the fact  
3 that the State excused a Hispanic juror and an African-American juror showed a pattern  
4 of discrimination against minority prospective jurors. Exh. 9, pt. 1, pp. 3-8. The State  
5 first argued that striking two jurors is hardly a pattern. They further responded that they  
6 used a peremptory strike against the African-American woman in question because she  
7 stated that she had a brother in prison related to drug, prostitution, and trafficking  
8 convictions. She had also said that her brother was wrongfully imprisoned due to a girl  
9 lying about her age to police. The district attorney noted “she couldn’t be more right to  
10 put off my jury, whatever color her skin was.” *Id.* at 4.

11       With respect to the Hispanic prospective juror, the State said they primarily  
12 wanted to use the strike in order to “get to the pool” because there were a couple of  
13 upcoming prospective jurors that they viewed as favorable. The prosecutor also noted  
14 that the prospective juror seemed particularly gullible. The prosecutor observed that the  
15 State had only exercised 4 peremptory strikes and also that the defense had used  
16 peremptory strikes against 3 Hispanics and an African American woman.

17       The state district court denied the motion for mistrial, concluding that the State  
18 “sufficiently articulated the reasons for their challenges per *Batson*.” The court also  
19 observed that in its view the jury pool and the jury as selected were sufficiently diverse.  
20 *Id.* at 6.

21       The Nevada Supreme Court denied the claim on direct appeal, stating:

22       Moore claims that the district court erred in denying his motion for a  
23 mistrial pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). In his motion,  
Moore alleged that the State used two of its four peremptory challenges in  
a discriminatory manner. The State offered the following explanations for

1 striking the two minority panel members: (1) juror Barber because her  
2 brother was tried for pandering and drug trafficking and she believed he  
3 was treated unfairly by police and (2) juror Enriquez because she  
4 appeared gullible and easily persuaded by the defense's theory of the  
5 case. The district court ruled that these rationales were not pretextual, and  
6 we also conclude that, because "discriminatory intent is not inherent in the  
7 State's explanation[s]," and those explanations are not "implausible or  
8 fantastic," the district court did not clearly err in rejecting Moore's *Batson*  
9 challenge. *Ford v. State*, 122 Nev. 398, 403, 404, 132 P.3d 574, 578  
(2006).

10 Exh. 21 at 1–2.

11 There is no support for Moore's claim that the trial court failed to engage in an  
12 analysis of the validity of the prosecutor's explanations. The Nevada Supreme Court's  
13 adjudication of this claim did not result in a decision that was contrary to, or involved an  
14 unreasonable application of, clearly established federal law, as determined by the  
15 Supreme Court of the United States; nor was its decision based on an unreasonable  
16 determination of the facts in light of the evidence presented in the State court  
17 proceeding. See 28 U.S.C. § 2254(d). Accordingly, Moore is not entitled to federal  
18 habeas relief on ground 2.

### 19 **Ground 3**

20 Ground 3 alleges ineffective assistance of defense counsel in violation of  
21 Moore's Sixth and Fourteenth Amendment rights (ECF No. 32, pp. 17-19). Ineffective  
22 assistance of counsel (IAC) claims are governed by the two-part test announced in  
23 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held  
that a petitioner claiming ineffective assistance of counsel has the burden of  
demonstrating that (1) the attorney made errors so serious that he or she was not  
functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the  
deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing

1 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that  
2 counsel's representation fell below an objective standard of reasonableness. *Id.* To  
3 establish prejudice, the defendant must show that there is a reasonable probability that,  
4 but for counsel's unprofessional errors, the result of the proceeding would have been  
5 different. *Id.* A reasonable probability is "probability sufficient to undermine confidence in  
6 the outcome." *Id.* Additionally, any review of the attorney's performance must be "highly  
7 deferential" and must adopt counsel's perspective at the time of the challenged conduct,  
8 in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the  
9 petitioner's burden to overcome the presumption that counsel's actions might be  
10 considered sound trial strategy. *Id.*

11       Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
12 performance of counsel resulting in prejudice, "with performance being measured  
13 against an objective standard of reasonableness, . . . under prevailing professional  
14 norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations  
15 omitted). When the ineffective assistance of counsel claim is based on a challenge to a  
16 guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate "that  
17 there is a reasonable probability that, but for counsel's errors, he would not have  
18 pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52,  
19 59 (1985).

20       If the state court has already rejected an ineffective assistance claim, a federal  
21 habeas court may only grant relief if that decision was contrary to, or an unreasonable  
22 application of, the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).  
23 There is a strong presumption that counsel's conduct falls within the wide range of

1 reasonable professional assistance. *Id.*

2 The United States Supreme Court has described federal review of a state  
3 supreme court's decision on a claim of ineffective assistance of counsel as "doubly  
4 deferential." *Cullen*, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411,  
5 1413 (2009)). The Supreme Court emphasized that: "We take a 'highly deferential' look  
6 at counsel's performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403  
7 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance  
8 of counsel claim is limited to the record before the state court that adjudicated the claim  
9 on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has  
10 specifically reaffirmed the extensive deference owed to a state court's decision  
11 regarding claims of ineffective assistance of counsel:

12 Establishing that a state court's application of *Strickland* was  
13 unreasonable under § 2254(d) is all the more difficult. The standards  
14 created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at  
15 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.  
16 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review  
17 is "doubly" so, *Knowles*, 556 U.S. at ——, 129 S.Ct. at 1420. The  
18 *Strickland* standard is a general one, so the range of reasonable  
19 applications is substantial. 556 U.S. at ——, 129 S.Ct. at 1420. Federal  
20 habeas courts must guard against the danger of equating  
21 unreasonableness under *Strickland* with unreasonableness under §  
22 2254(d). When § 2254(d) applies, the question is whether there is any  
23 reasonable argument that counsel satisfied *Strickland*'s deferential  
standard.

24 *Harrington*, 562 U.S. at 105. "A court considering a claim of ineffective assistance  
25 of counsel must apply a 'strong presumption' that counsel's representation was within  
26 the 'wide range' of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*,  
27 466 U.S. at 689). "The question is whether an attorney's representation amounted to

1 incompetence under prevailing professional norms, not whether it deviated from best  
2 practices or most common custom." *Id.* (internal quotations and citations omitted).

3 Here, Moore asserts that his counsel was ineffective for failing to investigate  
4 Moore's competency in light of Moore's irrational rejection of a guilty plea deal (ECF No.  
5 32, pp. 17-19). Moore notes that medical staff at Clark County Detention Center  
6 prescribed him 2 antidepressants. Defense counsel did not have Moore's competency  
7 evaluated. Moore contends that after the victim failed to appear in justice court the  
8 State offered a plea agreement whereby Moore would be eligible for release in 8 years.  
9 Moore rejected the offer and proceeded to trial. *Id.* Moore includes a 2013 letter from  
10 defense counsel that states that, according to her notes in the file, the State offered 8-  
11 to-life on the day that the preliminary hearing was scheduled but the victim was not  
12 present, which Moore rejected.

13 The state district court dismissed the claim because it was alleged in such a  
14 cursory and unspecific manner as to be insufficiently pleaded. Exh. 24 at 4. Moore  
15 appealed, and the Nevada Supreme Court affirmed the denial of Moore's petition,  
16 stating:

17 [A]ppellant claimed that counsel failed to seek a pretrial competency  
18 evaluation as appellant asserted he used antipsychotic medication during  
19 trial. Appellant failed to demonstrate that counsel's performance was  
20 deficient or that he was prejudiced. That appellant used medication during  
21 trial was insufficient to demonstrate that he did not have the ability to  
22 consult with his attorney with a reasonable degree of rational  
23 understanding and that he did not have a factual understanding of the  
proceedings against him. See *Melchior-Gloria v. State*, 99 Nev. 174, 179-  
80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S.  
402, 402 (1960)). Appellant failed to demonstrate a reasonable probability  
of a different outcome had counsel sought a pretrial competency  
evaluation. Therefore, the district court did not err in denying this claim.  
Exh. 27 at 3.

1 In his federal petition, Moore mischaracterizes the references he made to his  
2 mental health in his voluntary statement to the detective. As noted above in the  
3 discussion of ground 1, Moore *did* state that he needed mental health assistance. But  
4 any fair reading of his statements reveal that he was focused on having exercised bad  
5 judgment: “I made the wrong the judgment instead of being like a father figure and  
6 saying—no . . . I’m sayin’, would make the wrong mental judgment.” “But I know I  
7 have this feeling towards, you know, the way I look at little girls, and I know it ain’t right  
8 so, you know, mentally it’s wrong.” Exh. 3. Moore has not shown that a competency  
9 evaluation had a reasonable probability of changing the result of the trial. Further, the  
10 2013 letter from the public defender—referencing her 2008 notes—is the sum total of  
11 information or evidence about the plea deal. Moore has failed to demonstrate that the  
12 Nevada Supreme Court’s decision was contrary to or involved an unreasonable  
13 application of *Strickland* or was based on an unreasonable determination of the facts in  
14 light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

15 Federal habeas relief is denied as ground 3.

16 Accordingly, the petition is denied in its entirety.

17 **IV. Certificate of Appealability**

18 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules  
19 Governing Section 2254 Cases requires this court to issue or deny a certificate of  
20 appealability (COA). Accordingly, the court has sua sponte evaluated the claims within  
21 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*  
22 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

23 ///

1 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner  
2 "has made a substantial showing of the denial of a constitutional right." With respect to  
3 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists  
4 would find the district court's assessment of the constitutional claims debatable or  
5 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463  
6 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable  
7 jurists could debate (1) whether the petition states a valid claim of the denial of a  
8 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

9 Having reviewed its determinations and rulings in adjudicating Moore's petition,  
10 the court finds that none of those rulings meets the *Slack* standard. The court therefore  
11 declines to issue a certificate of appealability for its resolution of any of Moore's claims.

12 **IT IS THEREFORE ORDERED** that the third-amended petition (ECF No. 32) is  
13 **DENIED** in its entirety.

14 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

15 **IT IS FURTHER ORDERED** that the Clerk shall enter judgment accordingly and  
16 close this case.

17 Dated: March 28, 2019.



18 \_\_\_\_\_  
19 LARRY R. HICKS  
20 UNITED STATES DISTRICT JUDGE  
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23